abandoned it for the doctrine that nonconsent may be shown by circumstantial evidence even where the owner is present. *Nixon* v. *State,* 89 Neb. 109; *Fowle* v. *State,* 47 Wis. 545. The Texas courts seem also to hold that direct evidence where obtainable must be produced. *Gomez* v. *State,* (Tex. Cr. App.), 206 S. W. 86. The doctrine thus asserted seems based on the so called "best evidence" rule. But there is no general principle that the best evidence must be produced in all cases. There are only a few definite exceptions where the best possible evidence is required. 2 WIGMORE'S EVIDENCE, § 1286; *Elliot* v. *Van Buren,* 33 Mich. 49. The present case is not one for testimonial preference. That direct evidence of the nonconsent of the owner in larceny is not required, but that, on the other hand, such nonconsent may be established circumstantially is well recognized by the weight of authority and reason. *People* v. *Jacks,* 76 Mich. 218; *McAdams* v. *State,* 23 Wyo. 294; *Filson* v. *Terr.,* 11 Okl. 351. There is no reason for requiring direct testimony by the owner of his nonconsent in these cases where nonconsent is an element of the crime. The court in the principal case rightly held that the presumption of innocence in favor of the defendant was always sufficient protection against an unjust conviction upon circumstantial evidence of nonconsent. The defense in such a situation might assert the well recognized general principle that non-production of evidence that naturally would be produced by an honest party permits the inference that its tenor is unfavorable to that party's cause. *Clifton* v. *U. S.,* 4 How. 247. So where the owner is not called by the prosecution to testify to his nonconsent, an inference is imputable that his testimony would be unfavorable to the prosecution, that if called he would admit consent. But where the witness is equally available to both parties, it would seem no inference could be allowed, particularly where the witness is actually in court,—*Crawford* v. *State,* 112 Ala. 1,—or that the inference would be available to both parties, the strength of the inference against either depending on circumstances. *Harriman* v. *Railroad,* 173 Mass. 28. In the principal case the inference could hardly be made use of by the defense for the owner as a witness was equally available to both parties;—to the defense to prove consent if such was the fact. In some cases this inference might, however, become most advantageous to the defense.

FRAUDS, STATUTE OF—GRANTOR'S ORAL AGREEMENT TO INCLUDE RESTRICTION CLAUSES IN DEEDS TO OTHER PERSONS VOID.—A subdivision was platted with the intention of making it a high-class residence section. The owner of the tract sold lots to plaintiffs subject to building restrictions contained in the deeds, and orally promised to place building restriction clauses in deeds to other persons. The defendant church purchased a lot without a restrictive clause, but with knowledge of the general plan. P now seeks to enjoin D from erecting a church on the lot. *Held,* that D, having notice of the plan was estopped from constructing the church on the lot. *Johnson* v. *Mt. Baker Park Presbyterian Church,* (Wash., 1920), 194 Pac. 536.

The defendant's contention was that plaintiff could not have any legal ground for enjoining the erection of church, unless he had an interest or easement in the lot, and that the only evidence of such interest was in the

oral promise of the grantor to plaintiffs that it would incorporate the usual restrictive clauses in all deeds made by it, which was void under the Statute of Frauds. The court disposes of this claim by saying that the oral promise would be unenforcible as an attempt to create an interest in the lands to be conveyed, but that in this case the plaintiffs have no interest or easement in defendant's land in the sense of the Statute of Frauds. The court gives no explanation of why the agreement is not within the Statute of Frauds. It is difficult to understand why the right claimed by the plaintiffs, to control and dictate as to the use which should be made of this lot, and the manner in which defendant should build upon it, is not an interest in the land within the Statute. In *Sprague* v. *Kimball,* 213 Mass. 380, it was held that such an agreement as is involved here created an interest in the land within the Statute. See also, *Ham* v. *Massoit Real Estate Co.,* (R. I.), 107 Atl. 1205; 19 MICH. L. REV. 219. However, conceding that the promise in this case is within the statute, in some jurisdictions the decision might be supported on the theory of estoppel. *Lennig* v. *Ocean City Ass'n,* 41 N. J. Eq. 606; *Woods* v. *Lawrence,* (Tex.), 109 S. W. 418. For a general discussion of the question see, TIFFANY, REAL PROPERTY, Vol. 2, [2nd Ed.] 1425 *et seq;* 45 L. R. A. (N. S.) 962; 16 MICH. L. REV. 90.

FRAUDS, STATUTE OF—PLEADING SIGNED BY COUNSEL SUFFICIENT MEMORANDUM WITHIN 4TH SECTION OF STATUTE OF FRAUDS.—A sued B for specific performance of a contract to sell a house. Defense, signed by counsel, that B had already contracted to sell to C, and counterclaim for rescission. A then added C as defendant. C relied on his contract, and counterclaimed that he was entitled to the house free from A's claim. A in answer to C relied on the Statute of Frauds. *Held,* that B's defense (which contained all the terms of C's contract) was a sufficient memorandum within the Statute, and therefore specific performance was denied. *Grindell* v. *Bass* [1920], 2 Ch. 487.

The purpose of the Statute is not to impose a new rule of law as to what constitutes a valid contract, but only to require a formality of proof in order to make a contract enforceable. WILLISTON ON CONTRACTS, SECTION 579. Therefore, it is immaterial with what purpose the requirement of the Statute is fulfilled. The parties do not need to intend the paper signed to be a memorandum of sale. They may have the contrary intention. For example, it is not unusual for a party to write a letter, in which, after stating the terms of the bargain, he repudiates it, or refuses to enter into a written contract. Yet the courts have consistently held that such a letter satisfies the requirements of the Statute. *Drury* v. *Young,* 58 Md. 546; *Heideman* v. *Wolfstein,* 12 Mo. App. 366; *Poel* v. *Brunswick Balke-Callender Co.,* 114 N. Y. S. 725; *Dewar* v. *Mintoft,* [1912] 2 K. B. 373. It is certainly true that the attorney in the instant case had no authority to sign a memorandum of the sale; but, it goes without saying, that he did have authority to sign the pleadings filed in the former suit. The Statute requires that the memorandum be signed by the party to be charged, or "by his agent thereunto lawfully authorized." But authorized to do what? Must he be authorized to sign a note or memorandum of sale, or is it sufficient if he is authorized to sign the paper which he did